No. 45748-2-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

DAN ALBERTSON, as Limited Guardian ad Litem for AIDEN RICHARD BARNUM, an incapacitated minor,

Appellants,

v.

STATE OF WASHINGTON acting through its DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF APPELLANTS

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A. INTRODUCTION

Child Protective Services ("CPS") did not properly conduct its statutory investigation of child abuse in the case of a 12-day-old infant, Aiden Barnum. On November 18, 2008, Aiden was taken to Harrison Memorial Hospital ("Harrison") with a spiral fracture of his upper left arm. His parents and grandmother were not able to explain when or how the fracture occurred. Over the next 24 hours, Aiden's family offered inconsistent, contradictory, and implausible explanations for the severe injury.

CPS did not follow its own investigative protocols. Aiden's multiple treating physicians suspected his injuries were non-accidental, but CPS staff nevertheless permitted Aiden to return home with the person who caused his spiral fracture, his father, Jacob Mejia. CPS did not impose any conditions on Aiden's return home, nor did it create or implement an effective safety plan to protect Aiden. Even though its investigation of child abuse was ongoing, for the next five weeks CPS had no contact with Aiden or his family, and took no follow-up action to protect Aiden during that time.

On December 23, 2008, Aiden returned to Harrison with massive injuries, including a fractured right arm, fractured collarbone, fractured ribs, fractured skull, subdural hematoma, seizures, and what became a

devastating, permanent brain injury. Mejia caused these injuries. Aiden will need constant care for the rest of his life. He will probably never walk or talk.

After trial proceedings that spanned six weeks, twelve jurors unanimously found that CPS was negligent in its investigation, and that CPS harmfully returned Aiden to his abuser's home. After having been instructed, however, that Mejia's abuse could have been a "superseding cause" of Aiden's injuries, the jury determined that CPS's negligence was not a proximate cause of Aiden's injuries.

The jury's verdict on proximate cause cannot stand, and must be reversed. CPS negligently returned Aiden to the home of his abuser, who shortly thereafter permanently injured him. As a matter of law, CPS was a proximate cause of Aiden's damages.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in refusing to admit Exhibit 41, certain testimony of Sarah Tate's counselor, Kelley West, and expert rebuttal testimony regarding West's representations.

2. The trial court erred in allowing Assistant Attorney General Barbara Bailey to testify as an expert regarding her opinions on issues of law.

3. The trial court erred in giving Instruction No. 3.

4. The trial court erred in giving Instruction No. 14.

5. The trial court erred in giving Instruction Number 16.

6. The trial court erred in entering the judgment on the verdict of the jury on November 27, 2013.

(2) Issues Pertaining to the Assignments of Error

1. Did the trial court err in instructing the jury on superseding causation when it was not at issue as a matter of law and undisputed fact, because the same person who was the subject of an ongoing CPS investigation of child abuse for fracturing an infant's arm abused the infant again five weeks later? (Assignments of Error Numbers 3, 4, 5, 6)

2. In a case involving CPS's investigation of a father's abuse of his infant son, did the trial court abuse its discretion in foreclosing the admission of the records of the mother's counselor that evidenced the father's escalating violence and potential for a pattern of violence toward the mother and the son and that were relevant to CPS's notice of the likely harm to the son if he remained unsupervised with his parents? (Assignments of Error Numbers 1, 6)

3. Did the trial court compound its earlier error on the counseling records when it denied the plaintiffs the opportunity to cross-examine CPS's key causation witness who knew of the contents of the counselor's records but nevertheless testified incorrectly that the records did not contain any reference to potential violence against the child, and that CPS thus had no notice of any risk to the child by allowing the infant to remain unsupervised with his parents? (Assignments of Error Numbers 1, 6)

4. Did the trial court err in permitting an Assistant Attorney General to testify to the legal sufficiency of the facts to

sustain the institution of a dependency proceeding as to the abused infant child? (Assignments of Error Numbers 2, 6)

C. STATEMENT OF THE CASE

(1) Factual History

On November 18, 2008, 12-day-old Aiden Barnum was brought to Harrison Medical Center in Bremerton by his family because there was something wrong with his left arm and he could not move it. RP 387. X-rays were taken. RP 296. Aiden was diagnosed with a spiral mid-shaft humerus fracture of his upper left arm. RP 299. Family members first tried to explain the fracture by stating Aiden had been passed around at a wedding a few days earlier. RP 338-39. Dr. William Moore, an emergency room doctor at Harrison, determined that the explanations of Aiden's fracture as accidental were inconsistent with the severity of the injury. RP 396. Moore had a "high suspicion that this was non-accidental trauma." *Id.* He instructed the Harrison social worker Nicole Miller to convey this information to CPS. RP 398. Dr. Moore also believed that the situation warranted calling law enforcement to place Aiden in protective custody. *Id.*

Miller interviewed the family regarding Aiden's injury on November 18. RP 421. She told the parents that she did not understand how Aiden being passed around at a wedding could have caused the

injury. RP 430. The grandmother, who was not present when the injury occurred, then suggested the arm could have been broken during swaddling. *Id.* Miller did not think swaddling could cause the fracture and told Aiden's parents that they needed to be honest. RP 434. Sarah Tate, Aiden's 17-year-old mother, then said to Jacob, "don't be mad." *Id.* She told Miller that Jacob had fed and swaddled the baby on the morning of November 18, 2008. RP 434. When Sarah changed the baby later that morning, his "arm was limp." *Id.*

After Dr. Moore and Miller interviewed the family, they concluded Aiden should be placed in protective custody; they contacted CPS and law enforcement. Aiden was placed in protective custody. RP 435-36. He was transferred to Mary Bridge Children's Hospital and Health Center ("Mary Bridge") in Tacoma later in the evening on November 18. CP 3289; RP 437. Upon arrival, an emergency room doctor, Dr. Jeffrey Bullard-Berent, evaluated Aiden. Dr. Bullard-Berent noted Mejia told him that Aiden had cried when Mejia swaddled him, but he always cried when he was swaddled. CP 1889. Dr. Bullard-Berent testified that "it takes usually significant energy to cause a fracture...I couldn't see how being wrapped in a blanket would have done that." CP 1904. Dr. Bullard-

Berent ultimately decided to admit Aiden on his belief that the injury was suspicious for non-accidental trauma. CP 1907, 1917.[1]

After Aiden was admitted to Mary Bridge, he was seen by a number of doctors there: Dr. Suzanne Parle, Dr. Victoria Silas, Dr. Timothy Spence, and Dr. Karen Nilsen. RP 291. *All* of these doctors believed Aiden's injury to be "concerning" or "highly suspicious" for abuse. RP 304, 323, 1299; CP 2408, 2427. Specifically, pediatric orthopedist Dr. Silas concluded that Aiden's spiral fracture was not consistent with the parents' story that it was caused by swaddling. RP 304-05.

Ultimately, because of the highly suspicious nature of Aiden's injury, the events surrounding it, and the inconsistent stories provided by his parents, Aiden was referred to Dr. Yolanda Duralde of Mary Bridge's Child Abuse Intervention Department for further evaluation. CP 2408.[2] Dr. Duralde believed, contrary to the six other doctors involved with Aiden, that the fracture could be consistent with Mejia's swaddling story. CP 2422. She did not contact any of those doctors before reaching her conclusion. RP 776; CP 2428, 2437, 2440.

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[1] Dr. Bullard-Berent's deposition testimony was played for the jury at trial. RP 451.

[2] Dr. Duralde's deposition testimony was played for the jury at trial. RP 1148.

CPS social worker Heather Lofgren was assigned as primary investigator on Aiden's case. RP 758. CPS assigned the highest possible "Risk Tag," 5, to Aiden's case.[3] RP 457, 503. Lofgren testified that the case was assigned to her as a risk tag of "High," and that the referral was for suspicion that the mother or father had abused Aiden. RP 764. Lofgren testified she was aware there were multiple stories provided by the parents and family as to the cause of Aiden's fractured arm, and that none of these stories was consistent with the severity of the injury. RP 767. Lofgren stated that this was significant in the context of investigating potential child abuse. RP 767-68. Lofgren further testified that an investigator in this context must obtain the medical records of the patient, but that she did not do so prior to Aiden being released back to his parents. RP 773-74, 1075.[4]

Lofgren, like Dr. Duralde, did not contact Dr. Moore, Dr. Bullard-Berent, Dr. Silas, Dr. Parle, Dr. Spence, Dr. Nilsen, or social worker Miller during her investigation. RP 774-75, 779. Lofgren also did not contact Kelley West, Tate's mental health counselor, although she knew

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[3] A "Risk Tag" indicates the risk assessment that the CPS intake worker places upon the case. RP 366. A Risk Tag of 5 means that the worker deems the case to present the highest possible risk. *Id.* CPS also deemed the case to require an emergent response, a status that is reserved for children at risk of imminent harm. Ex. 10, 39.

[4] Before December 23, 2008, neither Lofgren nor CPS obtained any medical records pertaining to Aiden from Harrison, Mary Bridge, Dr. Duralde, Aiden's pediatrician, or any other health care provider.

that Tate was seeing her on a regular basis. RP 774. If Lofgren had contacted Kelley West, West would have said that (1) she was concerned Mejia could be violent toward Aiden, (2) Jacob was verbally abusive and controlling toward Sarah, (3) Jacob told Sarah that he hates kids and they are annoying to him, (4) Jacob said he did not like to touch kids, and (5) Jacob had shoved Sarah to the ground at a Wal-Mart store while Sarah was pregnant. CP 511-14.

Instead of contacting these doctors and other professionals familiar with Aiden's circumstances, Lofgren relied *solely* on Dr. Duralde's assessment in deciding to return Aiden home to his father. RP 1071-72. Lofgren never interviewed members of Aiden's family separate from one another, contrary to interviewing techniques taught to Lofgren and commonly accepted as appropriate interviewing protocol for CPS caseworkers. RP 901.

Nevertheless, Lofgren did conclude and documented that Aiden was at risk of serious and immediate harm. RP 783, 873-74; Ex. 24. Under CPS policies in place at the time, this finding required Lofgren to develop and implement a safety plan with *mandatory* provisions separating the child from the person posing the safety threat, independent safety monitors, a caregiver who will assure protection, and regular contact by the CPS social worker. RP 783-84, 889; Ex. 26-38, 30.

However, Lofgren did not follow CPS guidelines. RP 784. Instead, she created a "safety plan" that consisted mostly of voluntary actions to provide "extra support" to Aiden's parents. RP 1073. More importantly, Lofgren did not mandate Aiden's separation from Mejia or assign independent monitors, as required by her risk findings. RP 783-84, 889.

Lofgren's stated rationale at trial for failing to impose these mandatory conditions in the safety plan was that Mejia was not a threat to Aiden because the spiral arm fracture was accidental. RP 892. She offered this testimony despite the fact that she had stated otherwise in her risk assessment for Aiden. RP 873-74.

From November 21 to December 23, 2008, neither Lofgren nor CPS had contact or followed up with the Mejia family. Neither Lofgren nor CPS took any action regarding any aspect of Lofgren's safety plan, or took any other action to protect Aiden's safety. RP 777-81.

One month later, on December 23, during the ongoing investigation of Aiden's spiral fracture, Aiden was brought back to Harrison with severe injuries.[5] RP 490. Mejia claimed that Aiden had fallen off of a loveseat 18 inches high. RP 491.

[5] December 23, 2008 is also when Lofgren actually entered all of her notes into CPS's system for her investigation of the November 2008 incident into CPS's records. RP 899, 1305. Almost all of her notes are entered within a one hour time period more

Aiden's injuries were not caused by falling 18 inches. Mejia severely abused him. CP 3982.[6] Aiden now suffers from severe chronic brain injury resulting from skull fractures, among a host of other conditions and injuries.[7] RP 492-93, 791-819. Aiden will require constant care for the rest of his life. RP 805. He will likely never walk or talk. RP 801-02.

CPS removed Aiden from his parents on December 23, 2008 and initiated a dependency proceeding. CP 1589. A superior court adjudicated Aiden a dependent child under RCW 13.34.130 and removed him from Tate and Mejia. Melissa and Bill Barnum were initially Aiden's foster parents, and eventually adopted him. CP 214, 553.

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than a month after her actions were supposedly taken. *Id.* Similarly, Billie Reed-Lyyski, the CPS worker who actually met with Aiden, entered her note regarding the November 2008 investigation in January 2009. RP 1422-23.

[6] Mejia was found criminally liable for the injuries to Aiden and sentenced to prison. CP 3982.

[7] Aiden's diagnosed injuries from abuse include: (1) severe and diffuse posttraumatic encephalopathy, (2) asymmetric spastic quadriplegic cerebral palsy (3) right parietal skull fracture, (5) rib fractures, (6) humeral fractures, (7) global developmental delays, (8) postural instability, (9) early scoliosis, (10) left-sided weakness, (11) non-functional left arm, (12) profound impairment in oral motor control, (13) microcephaly, (14) bilateral occipital plagiocephaly, (15) profound cognitive impairment, (16) sleep disturbance, (17) vision impairment, (18) left extropia, (19) amblyopia, (20) seizure disorder, (21) auditory processing disorder, (22) chronic digestive disease, and (23) bruxism. CP 646.

(2) Procedural History

Dan Albertson, as guardian ad litem for Aiden, brought this action in the Pierce County Superior Court against the State of Washington Department of Social and Health Services (hereinafter "CPS"). CP 17. On Aiden's behalf, the Barnums sought damages for his past and future damages against Dr. Duralde, Multicare, and CPS. *Id.* The case was assigned to the Honorable Susan Serko. CPS was the sole defendant at trial.

During the trial, the trial court permitted CPS to call Assistant Attorney General Barbara Bailey as an expert witness, despite Aiden's motions in opposition. RP 1644; CP 1051, 1291. Bailey was an attorney CPS assigned to Aiden's dependency case when it was finally filed. RP 1644. However, she had no personal knowledge of the events in the relevant time period of November 18 to December 23. *Id.* Bailey's testimony was primarily her opinion about whether Washington law would have permitted CPS to file a dependency petition due to the spiral fracture Aiden suffered in November 2008. RP 1631-78. In fact, Bailey admitted that legal analysis was her sole task in such matters:

> Q. And so, do DSHS social workers such as a CPS social worker, do they need to have a dependency petition reviewed by an assistant attorney general prior to a filing?
>
> A. Yes.

> Q. And why is that; do you know?
>
> A. Again, it's to determine – they're not lawyers, and so it's to determine whether or not the allegations that they've laid out in the petition are sufficient on a legal basis to warrant a filing of a petition in a court of law.

RP 1643-44. Bailey's entire testimony was that the law did not support the filing of a dependency petition in Aiden's case in November 2008. RP 1648-54, 1687.[8]

Bailey also specifically testified that nothing in Kelley West's records would have given CPS any notice prior to December 23, 2008 that Mejia was a risk to Aiden. RP 1686. When Aiden's counsel sought to cross-examine Bailey on the previously excluded statements in the West records that Mejia may pose a risk to Aiden, the trial court prevented him from doing so. RP 1696.

During the assembly of jury instructions, Aiden proposed a proximate cause instruction that made no reference to superseding cause. CP 2331. CPS proposed a proximate cause instruction that referenced superseding cause, and also a separate instruction defining superseding cause. CP 2380, 2381. CPS's only stated ground for requesting a superseding cause instruction was its intent to argue that Mejia's abuse broke the chain of causation between CPS's negligence and Aiden's

[8] CPS was not required to file a dependency petition to prevent Mejia from having unsupervised contact with Aiden. RP 1719.

injuries. RP 1841. Over Aiden's repeated objections, RP 1764, 1841, 1873, the trial court gave Instruction Number 14, defining proximate cause with reference to superseding cause, and Instruction Number 16, defining superseding cause. CP 3973, 3975. Instruction Number 3 also informed the jury that CPS was defending Aiden's claims on the grounds that "only Mejia" caused Aiden's injuries. CP 3962.

The jury was troubled on the causation issue. At one point during deliberations it sent a note to Judge Serko declaring it was at an impasse. CP 3954. Later on, it sent another note to the court asking for clarification on instructions 14 and 16, the proximate cause and superseding cause instructions. CP 3955. The trial court responded that the jury should review the instructions "as a whole." *Id.*

The jury found CPS negligent, but found that negligence was not a proximate cause of Aiden's injuries. CP 3990. The judgment on the jury's verdict was entered on November 27, 2013. CP 4027. This timely appeal followed. CP 4024.

D. SUMMARY OF ARGUMENT

The jury properly concluded that CPS was negligent in its actions relating to the abuse of Aiden at the hands of his father, Mejia. The jury also properly concluded that CPS's negligence resulted in a "harmful

placement decision," meaning Aiden's return to the home of his abuser, Mejia.

Despite the fact that Mejia more severely injured Aiden *one month* after CPS negligently returned Aiden to Mejia unsupervised during the pendency of an open child abuse investigation and despite a high risk assessment, the jury inexplicably concluded that CPS was not a proximate cause of Aiden's damages. The jury's decision is illogical as a matter of law. Proximate causation exists in this case.

The jury misapplied the law of causation here because the trial court erroneously instructed the jury on superseding causation. That the jury was confused by the trial court's actions is evidenced by the jury notes and the jury's irreconcilable answers to the special verdict questions.

Based upon the jury's negligence verdict and the undisputed facts, this Court can rule that causation exists as a matter of law. The judgment should be reversed, judgment should be entered in favor of Aiden on causation, and this case should be remanded for retrial on the issue of damages only.

In the alternative, this Court should reverse certain improper evidentiary rulings that prejudiced the verdict, and remand this case for a new trial. The trial court improperly permitted an assistant attorney general to offer a legal opinion that there was insufficient evidence to

initiate a dependency action as to Aiden. That witness also testified that CPS had no notice that Mejia presented a risk of harm to Aiden, a fact plainly contradicted by the excluded West testimony and records.

E. ARGUMENT

Whether CPS had a duty to Aiden was not disputed at trial, nor could it be. After the potential abuse was reported to CPS under RCW 26.44.030, CPS was obligated to investigate. RCW 26.44.050, *see* Appendix. CPS also had the duty to coordinate with law enforcement agencies in the investigation of abusive conduct. RCW 26.44.030(1).

Our Supreme Court has held that CPS's breach of its duty to investigate abuse and protect abused children is a basis for liability. *Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000); *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003) (CPS may be liable for allowing child to remain in abusive home).[9]

RCW 26.44.010, as it existed in 2008, firmly establishes the legislative intent in enacting RCW 26.44.050, which states in part:

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[9] Long before *Tyner*, the Supreme Court rejected claims of immunity by CPS caseworkers arising out of negligent placement decisions, *Babcock v. State*, 116 Wn.2d 596, 617, 809 P.2d 143 (1991), and the Court of Appeals had already recognized negligent investigation claims against CPS. *Yonker By & Through Snudden v. State Dep't of Soc. & Health Servs.*, 85 Wn. App. 71, 79, 930 P.2d 958, *review denied*,132 Wn.2d 1010 (1997); *Lesley for Lesley v. Dep't of Soc. & Health Servs.*, 83 Wn. App. 263, 273, 921 P.2d 1066 (1996), *review denied*, 131 Wn.2d 1026 (1997).

> The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children.

RCW 26.44.010.

This Court should construe the instructions here, particularly the instructions on causation, in the context of the Legislature's overarching statutory purpose to require CPS to properly investigate instances of child abuse, and to protect children like Aiden from abuse.

(1) Because The Jury Concluded CPS Negligently Caused Aiden to Be "Harmfully" Placed Back in Mejia's Home, Proximate Cause Exists Here as a Matter of Law and Remand for a Trial on Damages Only Is Warranted

This case presents a circumstance where the undisputed facts and the special verdict finding CPS negligent compel a conclusion as a matter of law on causation. Although causation is usually a question of fact for the jury, here this Court need not undo all of the work accomplished in the

trial court. Instead, this case can be remanded for trial on damages only, because the law – combined with the jury's special verdict on negligence – mean that no reasonable person could conclude CPS was not a proximate cause of Aiden's damages.

(a) Background on Proximate Cause and Superseding Cause

The jury concluded that CPS was negligent, but found that negligence was not a proximate cause of Aiden's damages. CP 3990. CPS's theory of superseding cause was that Mejia's abuse was a superseding cause of Aiden's injuries that broke the chain of causation between CPS's negligence and Aiden's damages. RP 2057. To understand why the jury's verdict on proximate cause is erroneous under CPS's theory of the case, a brief review of proximate cause is useful.

In the context of a negligence action, proximate cause has two elements: legal cause and cause-in-fact.[10] *Hartley v. State,* 103 Wn.2d 768, 777, 698 P.2d 77 (1985); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 307, 151 P.3d 201 (2006).

[10] The legal causation analysis focuses on whether, as a matter of policy, the connection between the ultimate result and the defendant's act is too remote or insubstantial to impose liability. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). Legal causation was not at issue below, because there is no question that if CPS breaches its duty to investigate child abuse and that breach results in a "harmful placement decision," Washington law holds CPS liable for any resulting damages. *M.W.*, 149 Wn.2d at 595.

"Cause in fact" refers to the actual, "but for," cause of the injury, i.e., "but for" the defendant's actions the plaintiff would not be injured. *Id.* Because there can be more than one cause of a harm, causation is often referred to as a "chain" of events without which a harm would not have happened. *See, e.g., Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 884, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006, 300 P.3d 415 (2013).

A superseding cause can break the causal chain in an analysis of cause-in-fact. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 813, 733 P.2d 969 (1987). A superseding cause is "an act of a third person ... which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Restatement (Second) of Torts* § 442 (1965). In determining whether an intervening act constitutes a superseding cause, the relevant considerations under § 442 are, *inter alia,* whether (1) the intervening act created a *different type of harm* than otherwise would have resulted from the actor's negligence; (2) the intervening act was *extraordinary* or resulted in extraordinary consequences; (3) the intervening act *operated independently* of any situation created by the actor's negligence. *Campbell*, 107 Wn.2d at 812-13 (emphasis in original).

Even if the intervening act of the third person constitutes a *criminal* act, that act does not constitute a superseding cause if the negligent actor should have recognized that the actor might so act. The *Restatement* addresses this issue as well:

> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

Restatement (Second) of Torts § 449 (1965).

Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are *not* reasonably foreseeable are deemed superseding causes. *Campbell*, 107 Wn.2d at 817; *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 442, 739 P.2d 1177, *review denied*, 109 Wn.2d 1006 (1987).

If the harm inflicted is the *same harm* that the negligent act might have prevented, rather than some different, independent, unforeseeable harm, sending a superseding cause instruction to the jury is reversible error as a matter of law. *Campbell*, 107 Wn.2d at 817.

(b) Cause-In-Fact Exists as a Matter of Law Because Mejia's Subsequent Abuse of Aiden Was Not Only Foreseeable, It Was the Precise Harm CPS Had a Duty to Prevent[11]

Cause-in-fact exists here as a matter of law. Although the existence of cause-in-fact is generally a question of fact left to the jury, *Petersen v. State,* 100 Wn.2d 421, 436, 671 P.2d 230 (1983), "[w]hether the case goes to the jury or the judge dismisses the claim for a failure to make a case for causation may depend on the actors and the circumstances involved." *Hartley*, 103 Wn.2d at 775. Thus, when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law. *LaPlante v. State,* 85 Wn.2d 154, 531 P.2d 299 (1975); *Balise v. Underwood,* 62 Wn.2d 195, 381 P.2d 966 (1963).

If no disputed evidence is adduced at trial to raise a fact issue regarding a defendant's theory as to how the plaintiff has failed to prove proximate cause, then determination of that issue as a matter of law is appropriate. *Ross v. Johnson*, 22 Wn.2d 275, 288, 155 P.2d 486 (1945). In *Ross,* the driver of a vehicle struck a pedestrian he did not see in a crosswalk. *Ross,* 11 Wn.2d at 280. The driver admitted at trial that: (1) he was speeding, (2) he knew the crosswalk was there, (3) he knew he could

[11] In response to CPS's CR 50 motion for judgment as a matter of law, Aiden argued that he had proven proximate cause at trial. CP 3411-16.

not see if a pedestrian was in the crosswalk because of another car blocking his vision, and (4) he knew it was a dangerous corner. *Id.* at 280-81. The trial court gave a jury instruction that stated if the jury concluded the driver had placed his car in a position where he could not see the crosswalk, it constituted both negligence and proximate cause as a matter of law. *Id.* at 281. The driver challenged the instruction on appeal, arguing that the jury should not have been instructed on the issue of proximate cause as a matter of law. *Id.* at 287.

The *Ross* court concluded that although proximate cause is usually a question for the jury, in that case the undisputed facts made it a question of law for the court:

> The case at bar falls within the exception, rather than within the general rule, above noted. The facts with reference to the happening of the accident are undisputed, and, in our opinion, the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion. ...It seems to us that appellant himself by his testimony concedes that his act was a proximate cause of the collision, and, since any question of respondent's contributory negligence has been eliminated by the verdict of the jury, we are compelled to conclude that appellant's act was the sole cause of the injury.

Ross, 22 Wn.2d at 287-88. In other words, if the material facts regarding causation are undisputed, and the jury has correctly concluded that the defendant was negligent, causation exists as a matter of law and no new trial is needed. *Id.*

Causation exists as a matter of law here because CPS, working in concert with law enforcement, has the authority to temporarily and immediately take a child into custody if there is "probable cause" to believe the children might be at risk of injury. RCW 26.44.050. Even if CPS is ultimately incorrect about its temporary decision to take a child into protective custody, it is immune from liability for that incorrect temporary decision if it acts in good faith and properly investigates. RCW 26.44.056(3); *Miles v. State, Child Protective Servs. Dep't*, 102 Wn. App. 142, 156, 6 P.3d 112 (2000), *review denied*, 142 Wn.2d 1021 (2001).

Causation exists here as a matter of undisputed fact. Nothing in the facts adduced at trial here breaks the chain of causation or foreseeability between Mejia's initial abuse, CPS's negligence, and the subsequent injuries to Aiden at the hands of his abuser. By finding CPS negligent, the jury found that *CPS made a harmful placement decision, and returned Aiden to the same harmful situation where he then was abused again.* CP 3969, 3990. Even CPS's own expert witness, Barbara Bailey, testified that it was within CPS's power to immediately remove Aiden from Mejia's care, or prevent Mejia's unsupervised contact with Aiden, without filing a dependency petition. RP 1651, 1654-55.[12] It was

[12] Again, there really can be no dispute about this, because it is true as a matter of law. RCW 26.44.050.

also undisputed that, on both occasions when Mejia abused Aiden, he was alone with the infant in his home. RP 1116.

Just as in *Ross,* reasonable minds could only conclude that in the absence of CPS's negligence in failing to discover the abuse and take action to prevent more abuse, Mejia could not have permanently and catastrophically injured Aiden on December 23. There is no evidence that a new trial on causation could reveal that would prove the abuse could have occurred absent CPS's negligence, because the jury found that CPS's actions resulted in a harmful placement decision. CPS was a cause-in-fact of Aiden's subsequent injuries as a matter of law.

(c) The Trial Court Erred in Instructing the Jury that Mejia's Acts Could Constitute a Superseding Cause of Aiden's Injuries and the Error Prejudiced the Special Verdict on Proximate Cause[13]

Despite the jury's finding that CPS negligently and harmfully placed Aiden back in Mejia's home, and despite having an instruction that there can be more than one proximate cause of an injury, CP 3974, the jury found that CPS's negligence was not a proximate cause of Aiden's injuries. CP 3990. CPS's only stated ground for requesting a superseding

[13] Jury instructions must permit each party to argue its theory of the case, must not be misleading, and when read as a whole must properly inform the jury of the applicable law. *Leeper v. Dep't of Labor and Indus.,* 123 Wn.2d 803, 809, 827 P.2d 507 (1994). A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, and for abuse of discretion if based upon a matter of fact. *Kappelman v. Lutz,* 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Here, the decision to offer superseding cause instructions was based upon fact.

cause instruction – that Mejia's acts of abuse broke the chain of causation – is improper as a matter of law. Thus, the jury's special verdict on proximate cause was prejudiced.

(i) No Superseding Cause Instruction Was Warranted Because Mejia's Foreseeable Second Act of Abuse Cannot Constitute a Superseding Cause

A jury instruction on superseding cause was only warranted here if Mejia's actions in abusing Aiden were *unforeseeable*. *Campbell*, 107 Wn.2d at 817; *Herberg v. Swartz*, 89 Wn.2d 916, 927–28, 578 P.2d 17 (1978). In *Herberg*, the owner of a hotel ridden with numerous fire code violations claimed that the negligence of the local fire department was an intervening act which constituted a superseding cause. The Supreme Court disagreed, stating that the "theoretical underpinning of an *intervening* cause which is sufficient to break the original chain of causation [*i.e.*, constitute a superseding cause] is the *absence of its foreseeability*." *Herberg* at 927 (emphasis added), *citing Boeing Co. v. State*, 89 Wn.2d 443, 446, 572 P.2d 8 (1978)); *Maltman v. Sauer*, 84 Wn.2d 975, 982, 530 P.2d 254 (1975); *Fosbre v. State*, 70 Wn.2d 578, 584, 424 P.2d 901 (1967). The Court also stated that "whether the intervening act is a *superseding* cause depends upon [1] whether it brings about a different kind of harm or [2] whether it operates independently of

the situation created by the actor's negligence." *Herberg,* 89 Wn.2d at 928 (citing *Restatement (Second) of Torts* §§ 442–45 (1965)).

CPS adduced no evidence – and never even suggested that evidence existed – of any *unforeseeable* act that could possibly constitute superseding cause of the serious injuries to Aiden.[14] The sole basis CPS advanced in support of a superseding cause instruction was Mejia's abuse, and its claim that CPS did not *cause* Mejia to act as he did in December 2008. However, CPS' negligence – its harmful placement decision and its failure to follow its own policies and procedures requiring that Mejia be separated from Aiden – provided Mejia with the opportunity to abuse Aiden.

The idea that the act of abuse could be an unforeseeable event that breaks the chain of causation between CPS' negligent investigation of child abuse and the resulting injuries defies common sense. Abuse was precisely the danger that CPS was tasked with preventing. In fact, CPS policies and procedures establish if it fails to separate a child victim from an abuser, future abuse is foreseeable. Ex. 26-28, 30.

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[14] Based on CPS's total lack of evidence on superseding cause, Aiden proposed a jury instruction that properly stated the law of proximate cause when a case presents no evidence that a superseding cause exists. CP 2331. Aiden also objected to CPS's proposed instruction on superseding cause. RP 1764, 1841, 1873. Despite these objections, the trial court instructed the jury on superseding cause in Instruction Numbers 14 and 16. CP 3973, 3975.

Indeed, if this result is sanctioned by this Court, the purpose of RCW 26.44.050 and cases upholding it is frustrated. CPS could *never* be liable. The injuries would always be *solely* the abuser's fault, and CPS would effectively be immunized from liability for negligent investigation that results in child abuse.

Mejia's abuse of Aiden was not an unforeseeable, extraordinary, or a different type of harm than the harm CPS could have prevented had it not been negligent. It is the precise harm that CPS's investigation of child abuse was designed to prevent. RCW 26.44.010. At the time of the second abuse, CPS had an ongoing investigation regarding the first abuse. The trial court abused its discretion in instructing the jury on superseding cause.

(ii) The Erroneous Superseding Cause Instructions Prejudiced the Verdict

The trial court's improper jury instructions warrant reversal if they were prejudicial to the outcome of the trial. *MacSuga v. Spokane County,* 97 Wn. App. 435, 441, 983 P.2d 1167 (1999), *review denied*, 140 Wn.2d 1008 (2000). Defective jury instructions require reversal only when the defect was prejudicial. "Prejudice means the outcome of the trial was affected." *Id.* If it is impossible to ascertain whether the jury decided an

issue based upon the error, prejudice exists. *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 472, 17 P.3d 641 (2001).

The erroneous superseding cause instructions led the jury to believe that under Washington law, an abuser's violence can break the chain of causation between a negligent and harmful CPS placement decision and the subsequent harm to a child. In fact, this is precisely what CPS argued to the jury. RP 2057. CPS claimed it did not cause Aiden's injuries because Mejia's actions were the "sole proximate cause" of Aiden's injuries:

> But if it was an unreasonable or negligent investigation, it had to result in a harmful placement decision. What was the placement decision here? *Allowing Aiden to go home*....
>
> Only in pure hindsight and armchair quarterbacking can one say that the State proximately caused Aiden's injuries and damages that he's now suing for. *Jacob Mejia is the sole proximate cause and a superseding cause in this case*; that the State, you're being asked to be deemed, was also a cause for what happened on December 22nd.

RP 2057. In summation of its closing argument on causation, CPS repeated this theme:

> As I just mentioned, I submit to you that the State of Washington conducted a reasonable investigation, they were not negligent and that was not a proximate cause of a harmful placement or allowing him to remain in an abusive home. That anything that the plaintiff claims on the follow-up that somehow that was a proximate cause, we

> submit to you it was not, *that that did not cause Jacob Mejia to do what he did on* December 22nd.

RP 2059 (emphasis added).

The trial court's instructions on superseding causation – Instructions 3, 14 and 16 – confused and prejudiced the jury's consideration of proximate cause. CP 3962, 3973, 3975.[15] The jury was under the impression that after CPS "harmfully" placed Aiden back in his abuser's home, the abuser's additional abuse could nonetheless constitute a "sole," only, "superseding," and/or "independent" cause of harm that relieved CPS of any liability. CP 3973, 3975.

The jury instructions were improper as a matter of law and prejudiced the special verdict on proximate cause. Reversal of the special verdict on proximate cause is warranted.

(d) This Court Can Rule as a Matter of Law on Causation, It Need Not Remand for Re-Trial on that Issue

Although the jury evidently was led astray by the incorrect jury instructions, this Court need not undo the months of preparation and weeks of trial work on remand. It can remand for retrial on the issue of

[15] In the context of the erroneous superseding cause instruction, it is likely that Instruction Number 21 on segregation of damages increased jury confusion. CP 3983. That instruction told the jury that it should segregate from its damage award "any damages that were caused by the acts of Jacob Mejia and not proximately caused by the negligence of [CPS]." CP 3983. This instruction, read with the superseding cause instructions, may have convinced the jury that it should only find CPS proximately caused Aiden's damages if it physically harmed Aiden.

damages only, because it can rule that CPS's negligence caused Aiden's damages as a matter of law.

If a trial court finding as to an issue is clearly erroneous, and the facts and law before this Court compel but one conclusion on that issue, this Court may decide the issue rather than remanding it for decision by the trial court. *Littlefair v. Schulze*, 169 Wn. App. 659, 668, 278 P.3d 218 (2012), *review denied*, 176 Wn.2d 1018, 297 P.3d 706 (2013).

A limited trial on remand is also supported by this Court's recent decision in *Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 15 P.3d 1143 (2013), *review denied*, 180 Wn.2d 1011 (2014), *citing Mina v. Boise Cascade Corp.*, 104 Wn.2d 696, 707, 710 P.2d 184 (1985). In that case, the jury returned a special verdict with separate findings on liability and damages. *Id.* at 727. This Court concluded that because the issues on remand were distinct, justice did not require resubmission of the entire case to the jury. *Id.*

Here, the jury unanimously resolved the issue of negligence, and proximate cause exists as a matter of law and undisputed fact. As explained *supra,* the jury was instructed that it could only find CPS negligent if it harmfully returned Aiden to an abusive home when it should not have done so. CP 3969. The jury found that CPS was negligent. It is undisputed Aiden was in that same abusive home with his prior abuser just

one month later, and foreseeably he was again abused and severely injured. CP 1116.

These facts and findings compel only one conclusion on causation: that CPS proximately caused Aiden's injuries as a matter of law. This Court should reverse the jury's verdict on proximate cause, instruct the trial court to enter judgment as a matter of law on the causation issue, and remand this case for a trial on damages only.

(2) In the Alternative, the Jury's Finding On Causation Is Irreconcilable With the Negligence Finding, and Remand for a New Trial on Causation and Damages Is Warranted

Even if this Court believes it cannot rule on the causation issue as a matter of law, the jury's findings on causation and negligence are irreconcilable. This Court should reverse and remand for a new trial on causation and damages.

The trial court's erroneous jury instructions and improper evidentiary rulings, discussed *supra,* prejudiced the verdict because they resulted in irreconcilable special verdict answers.

If special verdict answers conflict with each other, a court must attempt to harmonize them. *Blue Chelan, Inc. v. Dep't of Labor & Indus.,* 101 Wn.2d 512, 515, 681 P.2d 233 (1984). Where the answers are reconcilable, the trial court must enter judgment accordingly, but where the answers are irreconcilable, the trial court must order further

deliberations or a new trial. *Tincani v. Inland Empire Zoological Soc'y,* 124 Wn.2d 121, 136, 875 P.2d 621 (1994); *Haney v. Cheatham,* 8 Wn.2d 310, 325–26, 111 P.2d 1003 (1941); *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 866-67, 313 P.3d 431 (2013). A court must order a new trial if a verdict indicates the jury disregarded its instructions. *Tincani,* 124 Wn.2d at 136 (citing *Nichols v. Lackie,* 58 Wn. App. 904, 907, 795 P.2d 722 (1990), *review denied,* 116 Wn.2d 1024 (1991)).

One sure indicator that special verdicts are irreconcilable is that they are illogical based on the facts presented at trial, and the law that applies to those facts. *Alvarez v. Keyes*, 76 Wn. App. 741, 743, 887 P.2d 496, 497 (1995). In *Alvarez,* two drivers – Alvarez and Keyes – collided with each other. *Alvarez,* 76 Wn. App. at 742. They each claimed the other was negligence, and a trial was held on their claim and counterclaim. *Id.* The jury returned two special verdicts. On Alvarez's claim of negligence by Keyes, the jury found Keyes was not negligent. However, on Keyes's counterclaim of negligence by Alvarez, the jury found that Keyes was 55% responsible for her own injuries. *Id.* Because there were only two parties involved, this Court concluded that these two conclusions were "illogical" because Keyes' duty of care was identical for both the claim and counterclaim:

> The special verdicts are patently inconsistent and cannot be reconciled. It is illogical that Keyes could be 55 percent negligent for her own damage to her car, but not negligent at all for the accident, where her duty of care is identical in both cases.

Id. at 743. Thus, when two special verdict answers are logically inconsistent, this Court must reverse. *Id.*

Under the jury instructions given, the jury found CPS negligently investigated the November 18, 2008 child abuse referral, resulting in the harmful placement of Aiden back with Mejia. CP 3969, 3990. According to Instruction Number 14,[16] Aiden only needed to prove that CPS's negligence was *a* proximate cause, not *the* proximate cause of his abuse by Mejia. CP 3973. It was undisputed that between November 18 and December 23, during an open CPS child abuse investigation, Mejia further abused Aiden and caused him additional injury. CP 3982; RP 1982, 1991. Absent CPS's negligent actions and inactions, Mejia could not have been alone with Aiden to brutalize him just one month later. Indeed, that is the unmistakable result of the jury finding CPS negligent under Instruction Numbers 9, 10, 12, 13, and 15. Thus, the jury disregarded the jury instructions and misunderstood the law of superseding cause.

[16] Instruction Number 14 does accurately state that there can be more than one proximate cause of an injury. As explained *supra,* Aiden's only objection to Instruction Number 14 is the insertion of a reference to superseding cause.

Despite the unbroken causal chain between CPS's negligence and Aiden's severe injuries, the jury inexplicably concluded that CPS's negligence played no role in the chain of causation leading to Aiden's devastating injuries. CP 3990. These two conflicting notions, that: (1) CPS was negligent in harmfully placing Aiden back in Mejia's hands, but (2) that CPS was not a proximate cause of Aiden's subsequent injuries in Mejia's hands, are irreconcilable. This Court cannot harmonize the two jury findings, and the special verdict on causation must be reversed.

(3) If This Court Remands this Case for Retrial, It Should Correct Evidentiary Errors to Avoid Their Repetition on Remand[17]

(a) The Trial Court Abused Its Discretion in Refusing to Admit Evidence from Counselor Kelley West that Would Have Prompted Further Investigation Regarding the Danger Mejia Posed to Aiden

The trial court here concluded that certain testimony and treatment notes of Kelley West, Tate's mental health professional, were inadmissible. RP 1023. Specifically, the trial court excluded any evidence regarding West's concerns that Mejia's history suggested potential jealousy towards Aiden that "would have put her and [Aiden] in pathway for potential violence." *Id.* The Court excluded the notes from

[17] Evidentiary decisions are reviewed for an abuse of discretion. *State v. Atsbeha*, 142 Wn.2d 904, 913, 16 P.3d 626, 631 (2001).

evidence entirely and restricted West's testimony on the subject at trial. *Id.*

(i) The West Evidence Should Not Have Been Excluded Under ER 403

The trial court's rationale for this decision was that West's opinions about Mejia's violent propensities were too prejudicial for the jury to hear under ER 403. RP 1020.

ER 403 concerns the admissibility of relevant evidence that may be nonetheless excluded because of an unfair effect it might have on the jury: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

ER 403 is the same as Federal Rule of Evidence 403, so Washington courts may look to both state and federal case law for guidance. *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). Both the state and federal rule concerns "unfair prejudice," which one court has termed as prejudice caused by evidence of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *United States v. Roark,* 753 F.2d 991, 994 (quoting *United States v. McRae,* 593 F.2d 700, 707 (5th Cir.), *cert. denied,* 444 U.S. 862

(1979)), *reh'g denied,* 761 F.2d 698 (11th Cir. 1985); *see also*, Karl B. Tegland, 5 *Wash. Prac.: Evidence Law and Practice* § 106 at 349 (3d ed. 1989). Another authority states that evidence may be unfairly prejudicial under Rule 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or "triggers other mainsprings of human action." 1 J. Weinstein & M. Berger, *Evidence* § 403[03] at 403–36 (1985).

Washington courts are in agreement with these authorities, stating that unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. *Lockwood v. AC & S, Inc.,* 109 Wn.2d 235, 257, 744 P.2d 605 (1987); *State v. Cameron,* 100 Wn.2d 520, 529, 674 P.2d 650 (1983).

In applying ER 403 "the linchpin word is 'unfair.'" *State v. Haq*, 166 Wn. App. 221, 261, 268 P.3d 997, 1017, *review denied*, 174 Wn.2d 1004 (2012); *State v. Rice,* 48 Wn. App. 7, 13, 737 P.2d 726 (1987). In almost any instance, a party can complain that the admission of evidence tending to show culpability is prejudicial, in that it may contribute to proving the proposition that the opposing party seeks to prove. *Id.* Addition of the word "unfair" to "prejudice" obligates the court to weigh the evidence seen in the context of the trial itself. *Id.*

In *Haq,* a defendant accused of shooting several victims at the Jewish Federation of Greater Seattle argued that jailhouse recordings of his phone calls should be excluded as unfairly prejudicial under ER 403. *Haq,* 166 Wn. App. at 261. In the recordings, he and family members made reference to acts of terrorism, jihadis, and hate mail the defendant had received. *Id.* at 262. Although he conceded the recordings were relevant to establish his state of mind, the defendant argued they were too prejudicial given national fears relating to terrorism. *Id.* The *Haq* court concluded that even those very inflammatory comments were admissible "given [the lack of evidence of links to terrorism] and the relevance of Haq's comments to his mental state...." *Id.*

Here, there was nothing unfairly prejudicial about the opinion of Tate's psychologist that Mejia might be capable of violence against Aiden. Such evidence would not arouse an improper emotional response from the jury, or cause them to make an irrational decision. The jury already knew that Mejia was capable of violence against Aiden – it was undisputed that he committed it. The only issue at trial was whether CPS gathered all of the available information regarding whether Mejia might be a threat to Aiden. There is simply no rational explanation for the trial court's conclusion that the evidence was *unfairly* prejudicial to CPS.

The evidence was also *highly probative*. Aiden sought to demonstrate that, had CPS conducted a more thorough investigation, it would have found evidence to put it on notice that the claim of accidental spiral fracture may not have been accurate. Had CPS conducted a proper investigation and accessed the West records on or near November 18, its staff would have had relevant information from West, a mental health professional familiar with Aiden's family situation, pointing to the possibility that Mejia was an abuser. Tate's opinions about Mejia – a teenage girl who was dating Mejia – must be fairly viewed in the context of West's concerns. Evidence that Tate's counselor had concerns about Mejia's potential for violence, combined with the information CPS had about Aiden's November 18th injury, would likely have sparked further inquiry about Aiden's broken arm. Lofgren admitted that if she had know the content of West's records she would have acted differently, and would have required the separation of Mejia from Aiden in her safety plan. . RP 949-950.

Balancing the highly probative value of West's notes and testimony regarding Mejia's potential for abuse of Aiden against the virtually non-existent prejudice alleged by CPS, the trial court abused its discretion in refusing to admit the evidence.

(ii) After CPS Opened the Door, the West Evidence Should Not Have Been Excluded Under ER 404

Even if the trial court's initial ER 403 ruling regarding West's evidence was correct, it should have allowed the testimony in rebuttal after CPS opened the door on the subject of evidence of West's concerns about Mejia's violent tendencies. RP 1651. West's evidence would have raised doubts about Mejia's claims that breaking Aiden's arm was an accident. CP 511-14.

The "opening the door" doctrine is an evidence doctrine that pertains to whether certain subject matter is admissible at trial. The term is used in two contexts:

> (1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008); Karl B. Tegland, 5 *Wash. Prac.: Evidence Law and Practice* § 103.14 at 66–67 (5th ed. 2007).

CPS opened the door to West's assessment of Mejia's violent tendencies when it asked AAG Barbara Bailey whether West's records contained anything that suggested Mejia could be violent towards Aiden.

RP 1686. Bailey responded that it would not, because nothing Tate said to West suggested Mejia's prior violence was more than "accidental." *Id.* In fact, Bailey specifically affirmed on the stand that nothing in the West records "gave any indication" that there was risk to Aiden:

> So none of those things gave any indication that there was ever risk of imminent harm to Aiden or that anything could be perceived to be happening to Aiden.
>
> ...And then, there were no additional records of Ms. West that really gave any risk of any imminent harm to the unborn child.

RP 1686.

On cross-examination, Aiden attempted to introduce the evidence regarding West's opinions, arguing that West's concerns about Mejia were necessary to rebut the suggestion that West's notes contained *nothing* to suggest Mejia was a risk to Aiden. RP 1695. The trial court still refused to admit the evidence saying that it went to Mejia's "propensity:"

> Boy, this is a tough one. I think this is too close to allowing West to testify to propensity of somebody to do something and on that basis, I'm going to restrict it and not allow that question.

RP 1696. Although the rule was not cited, this oral ruling indicates that the trial court believed the West evidence was inadmissible under ER 404.

ER 404 controls the admission of "propensity" evidence. *State v. Herzog*, 73 Wn. App. 34, 48, 867 P.2d 648, *review denied,* 124 Wn.2d

1022 (1994). The rule is only applicable to evidence a party seeks to admit in order to show action in conformity with previous actions. ER 404(a), (b). *Id.* If that evidence is *not* offered to show action in conformity therewith, it is admissible unless some other rule forbids it. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

While purported "propensity" evidence in West's records would not have been admissible in Mejia's criminal trial, it was relevant, probative, and not prejudicial in this case. CPS had the duty to assess the risks, using all of the available relevant evidence. Information from a mental health professional as to a potential abuser's propensity for violence was essential for an accurate assessment of that risk. The purpose of offering West's records at the negligence trial was not to prove whether Mejia actually had a propensity for violence, but to allow the jury to assess whether CPS, in failing to gather and review the information, negligently caused Aiden to be harmfully returned to his abuser's home.

Here, the West evidence was *not* offered to show that Mejia abused Aiden. Mejia's abuse of Aiden was not a question of fact at trial, it was undisputed. The West evidence was offered to contradict Bailey's statement that West's records were merely "talk therapy" and that "nothing" in West's records that "gave any indication that there was ever a risk of imminent harm to Aiden." RP 1685-86.

Because the West evidence directly contradicted Bailey's statements, and because it was highly probative and not prejudicial, the trial court abused its discretion in excluding it.

It was also an abuse of discretion for the trial court to prohibit effective cross-examination of Bailey with the West records on the grounds that Bailey had never indicated that she relied upon the records in giving her testimony. CPS's counsel specifically asked Bailey whether she had reviewed the West records. RP 1686. She indicated she had done so. *Id.* Then, she responded to another question from CPS's counsel indicating that there was nothing in those records that would change her opinions. *Id.*

Even if a trial court believes that certain evidence is generally inadmissible, it may be admitted for the limited purpose of impeaching a witness. *State v. Layne*, 196 Wash. 198, 203, 82 P.2d 553, 555 (1938). Allowing an expert witness to make representations about the contents of documents that expert knows have been excluded from evidence, without allowing the documents to be admitted for impeachment purposes, is an abuse of discretion.

Because Bailey made a material representation about the contents of the West records, Aiden should have been allowed to cross-examine

Bailey with specific records of West to discredit her testimony, whether she relied upon the records or not.

(iii) Exclusion of the West Records Was Prejudicial

Exclusion of the complete West records was prejudicial to Aiden's case. The trial court allowed CPS's expert witness to claim there was "nothing" in the records of concern about potential danger to the unborn child, and then preclude Aiden from cross-examining her with the specific record reviewed which proved that her testimony was false. Lofgren testified at trial that even if she had been aware only of the Wal-Mart incident in the West records, she would have prevented Mejia from having unsupervised access to Aiden. RP 949-950. However, Aiden was not permitted to examine Lofgren regarding West's warnings of danger to Aiden.

In light of Bailey and Lofgren's testimony exclusion of West's complete records was prejudicial to Aiden's case, and the trial court's decision should not be repeated on remand. With respect to both Lofgren and Bailey, Aiden should have been able to recite West's concerns about Mejia, and examine them regarding whether those concerns should have prompted more investigation, or caused CPS to prevent unsupervised access to Aiden. The jury should be allowed to assess West's complete

records in determining whether CPS's actions were adequate to protect Aiden.

The trial court abused its discretion in excluding the West evidence. The trial court on remand should be instructed to admit the evidence of West's testimony and notes regarding her opinions of the threat Mejia posed to Aiden.

(b) The Trial Court Abused Its Discretion in Allowing an Assistant Attorney General to Testify to a Legal Conclusion[18]

CPS was permitted to call its own attorney, AAG Barbara Bailey, as an expert witness to opine on whether the evidence in this case was legally sufficient to support a dependency petition. RP 1638-91. Such an opinion involved an issue of law, reserved to the court.

Bailey offered her legal opinion that under Washington law, CPS did not have sufficient grounds on November 18, 2008 to file a dependency petition in Aiden's case. RP 1643-44, Bailey specifically distinguished her role from that of CPS caseworkers by stating that her job was to analyze the law. RP 1643-44.

It has long been the rule in Washington that a witness, whether a fact witness or an expert witness, may not offer an opinion as to a legal conclusion. ER 702 authorizes the use of expert witnesses, but such

[18] Aiden opposed CPS's motion to add Bailey as a witness, and moved in limine to exclude the AAG's testimony. CP 1051, 1291.

experts may not testify to legal conclusions. ER 704. *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002), *review denied,* 148 Wn.2d 1019 (2003); *Hyatt v. Sellen Constr. Co.*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985); *Everett v. Diamond*, 30 Wn. App. 787, 791-92, 638 P.2d 605 (1985). "Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant's conduct violated a particular law;" *Olmeda*, 112 Wn. App. at 532. Similarly, a legal opinion about the sufficiency of the evidence to institute a dependency, coming from an individual in the Attorney General's office, would be impermissible.

In *Stenger v. State*, 104 Wn. App. 393, 16 P.3d 655, *review denied,* 144 Wn.2d 1006 (2001), this Court upheld a trial court's exclusion of the testimony of an attorney who worked in the field of disability law on disability law-related legal questions in the case of an instructional aide who sued the State for injuries she received at the hands of a dependent special education student. The attorney's testimony was essentially a legal opinion as to whether DSHS met its legal obligations with respect to the dependent child's education program. *Id.* at 408. *See also, Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003), *review denied,* 151 Wn.2d 1010 (2004) (excluding expert's legal opinions).

Just as this Court upheld the exclusion of the attorney's testimony in *Stenger*, this Court should conclude the trial court abused its discretion in allowing AAG Bailey to testify here. Her entire testimony consisted of her legal conclusions, and whether CPS met its legal obligations in this case. This is precisely the same kind of testimony that was rejected in *Stenger*, and it should have been rejected here.

Although this Court can enter judgment as a matter of law on causation and remand for a trial on damages only, should this Court conclude a re-trial of other issues is warranted, it should correct these prejudicial evidentiary errors to avoid their repetition on remand.

F. CONCLUSION

As a result of CPS's negligence, Aiden has suffered devastating injuries, injuries that will last the rest of his life. Aiden will probably never walk, run, or stand unassisted. He will not be able to communicate normally. He will never be able to care for himself, protect himself, or independently perform any activities of daily living. He will be totally dependent upon others and require 24-hour care for life.

CPS had a duty to conduct a reasonable ongoing investigation into alleged child abuse in Aiden's case in accordance with RCW 26.44.050, and to avoid making a harmful placement decision. CPS failed to properly conduct such an investigation. Contrary to its own policies and

procedures, CPS then failed to implement an appropriate safety plan, to prevent Aiden from being returned to Mejia's home, or to prohibit Mejia from having unsupervised contact with Aiden.

The jury properly concluded CPS was negligent but the trial court's instructional and evidentiary errors led the jury to conclude CPS's plain negligence was not the proximate cause of his devastating injuries at Mejia's hands. Because CPS acted negligently on November 18, 2008 in failing to separate Aiden from Mejia, it is indisputable that but for CPS's negligence, Aiden would not have been injured.

This Court can apply the law to the jury's findings and the undisputed facts at trial and rule that causation exists as a matter of law. The Court should reverse the judgment on the jury's verdict and remand this case to the trial court with instructions to enter judgment on proximate cause, and confine a new trial to the issue of damages. In the alternative, this Court should reverse the judgment and remand for a new trial on causation and damages, the trial court's previous evidentiary errors should not be repeated in that new trial.

Costs on appeal should be awarded to Aiden.

DATED this 30th day of July, 2014.

Respectfully submitted,

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APPENDIX

RCW 26.44.040 (prior to its 2012 amendment):

Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with the provision of chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

RCW 26.44.050:

Except as provided in RCW 26.44.030(11), upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050.

Court's Instruction Number 3:

> The Plaintiff claims that the State of Washington, through its departments and divisions, negligently investigated the November 18, 2008 child abuse referral regarding Aiden Barnum and as a result, Aiden Barnum was injured.
>
> Plaintiff claims that Defendant's conduct was a proximate cause of Aiden Barnum's injuries and damages which occurred after November 18, 2008.

Defendant denies Plaintiff's claims and further denies the nature and extent of Plaintiff's claimed injuries and damages.

Defendant claims as a defense that if there are injuries as claimed, only Jacob Mejia caused injury to plaintiff.

Court's Instruction Number 10:

The State of Washington through its divisions or department, must conduct a reasonable investigation of a report of child abuse. A claim against Defendant DSHS for negligent investigation is available when DSHS conducts a negligent investigation that results in a harmful placement decision.

CP 3969.

Court's Instruction Number 14:

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause produces the injury complained of and without which such injury would not have occurred.

There may be more than one proximate cause of an injury.

CP 3973.

Court's Instruction Number 15:

There may be more than one proximate cause of the same injury. If you find that the Defendant was negligent and that such negligence was a proximate cause of injury or damage to the Plaintiff, it is not a defense that some other force, some other cause, or the act of some other person who is not a party to this lawsuit, may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the Plaintiff was some other force, some other cause, or the act of some other person who is not a party to this lawsuit, then your verdict should be for the Defendant.

CP 3974.

Court's Instruction Number 16:

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury.

If you find that the defendant was negligent but that the sole proximate cause of the injury was a later independent intervening act of a person not a party to this action that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of the defendant is superseded and such negligence was not a proximate cause of the injury. If, however, you find that the defendant was negligent and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening act, then that act does not supersede defendant's original negligence and you may find that the defendant's negligence was a proximate cause of the injury.

It is not necessary that the sequence of events or the particular resultant injury be foreseeable. It is only necessary that the resultant injury fall within the general field of danger which the defendant should reasonably have anticipated.

CP 3975.

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Brief of Appellants in the Court of Appeals Cause No. 45748-2-II to the following parties:

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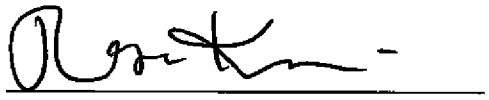
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 30th, 2014, at Seattle, Washington.



Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE FITZPATRICK LAW

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